

LLOYD D. LIVESAY, d.b.a. NU WAY COAL CO.  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 90-28

Decided December 4, 1989

Appeal from a decision of Administrative Law Judge Joseph E. McGuire affirming issuance of Cessation Order No. 89-132-421-15. Hearings Division Docket No. NX-7-46-R.

Appeal dismissed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

In accordance with 43 CFR 4.1273(a), an appellant's brief is due within 30 days of the filing of the notice of appeal. The regulations provide that if an appellant fails to file a timely brief, the appeal may be subject to summary dismissal. 43 CFR 4.1273(b). However, the failure to file a brief is not fatal where the notice of appeal contains sufficient grounds to support an appeal.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

Where an appellant in an appeal of a decision of an Administrative Law Judge, filed pursuant to 43 CFR 4.1271(a), provides mere conclusory allegations in its notice of appeal, without supporting reasons, and does not file a brief, the appeal may be dismissed.

APPEARANCES: Elsey A. Harris III, Norton, Virginia, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Lloyd D. Livesay, d.b.a. Nu Way Coal Company, has appealed a decision dated August 21, 1989, by Administrative Law Judge Joseph E. McGuire, affirming issuance of Cessation Order (CO) No. 89-132-421-15 by the Office of Surface Mining Reclamation and Enforcement (OSMRE), and denying Livesay's application for review of that CO.

The notice of appeal filed by Livesay on September 22, 1989, contained only the following assertions:

1. The Administrative Law Judge improperly concluded that the hearing in question was not barred by res judicata by effect of decisions in the rulings [Docket Nos. CH 0-60-R, CH 0-262-R and CH 0-222-P] which covered the same sites. The case Save Our Cumberland Mountains, Inc. v. Donald P. Hodel, Civil Action No. 81-2238, D.C. Circuit 1981 cannot be permitted to disturb settled cases.
2. The States [sic] action was appropriate in this case and therefore OSM's activities are barred by statute.

Livesay filed no further brief setting forth the reasons for this appeal.

In his decision, Judge McGuire discussed the doctrine of res judicata. He then ruled that it did not apply in this case because no final judgment or adjudication on the merits had been entered in Docket Nos. CH 0-60-R, CH 262-R, and CH 0-222-P. Those three proceedings had arisen from enforcement actions taken by OSMRE against Nu Way Coal Company (Livesay) at the same site involved in this case. On March 12, 1981, an Administrative Law Judge issued a decision ruling against Nu Way in Docket Nos. CH-262-R and CH-222-P and denied a motion to dismiss Docket No. CH-60-R. Nu Way filed with the Interior Board of Surface Mining and Reclamation Appeals (IBSMA) an appeal of the ruling in Docket No. CH-262-R and a petition for discretionary review of the Judge's ruling in Docket No. CH-222-P, docketed by that Board as IBSMA Nos. 81-56 and 81-57, respectively.

On April 15, 1981, IBSMA denied the petition for discretionary review for failure to prepay the amount of the proposed civil penalty, and in a November 6, 1981, order, IBSMA dismissed the appeal because the parties had entered into a compromise settlement. Subsequently, the Administrative Law Judge issued a consent decision in Docket No. CH-60-R, indicating that the issues in that case had been resolved as part of the compromise settlement.

Judge McGuire also discussed at length the June 6, 1985, settlement agreement which was the result of the court case cited by Livesay. The principal issue in that lawsuit was whether Kentucky and Virginia had properly granted 2-acre exemptions to surface coal mining and reclamation operations in those States. Under the settlement agreement, OSMRE agreed to inventory minesites which had been granted 2-acre exemptions, and the parties agreed to a specific inspection and enforcement procedure. The inspection and subsequent enforcement action undertaken in this case arose as a result of that agreement.

[1] The appeal in this case was filed pursuant to 43 CFR 4.1271(a). In accordance with 43 CFR 4.1273(a), the appellant's brief is due within 30 days of the filing of the notice of appeal. The regulations provide that if an appellant fails to file a timely brief, the appeal may be subject to summary dismissal. 43 CFR 4.1273(b). Moreover, the regulations require that "[a]n appellant shall state specifically the rulings to which

there is an objection, the reasons for such objections, and the relief requested." 43 CFR 4.1273(c). That same regulation provides that failure to specify a ruling as objectionable may be considered a waiver of objection. See Donaldson Creek Mining Co. v. OSMRE, 111 IBLA 289, 296 (1989).

[2] In this case, appellant's appeal is subject to dismissal because he filed no brief, as required by 43 CFR 4.1273(a). However, the failure to file a brief is not fatal where the notice of appeal contains sufficient grounds to support an appeal. Therefore, in this case we must examine those allegations which appellant included in his notice of appeal to ascertain whether they support his appeal. Review of those allegations reveals that they are, in fact, mere allegations without any supporting reasons. Thus, appellant has failed to provide any reasons to support his appeal.

While it is the Board's policy to avoid procedural dismissal where there is no showing of prejudice to an adverse party, James Mackey, 96 IBLA 356, 94 I.D. 132 (1987), an appellant bringing an appeal before the Board, must, with some particularity, show adequate reasons for the appeal and include argument or evidence of error. Conclusory allegations of error, standing alone, are insufficient. Add-Ventures, Ltd., 95 IBLA 44 (1986); United States v. Fletcher De Fisher, 92 IBLA 226 (1986). Appellant's appeal must be dismissed for failure to provide adequate reasons to support it.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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Bruce R. Harris  
Administrative Judge

I concur:

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Franklin D. Arness  
Administrative Judge